Supreme Court, U.S.
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90-1839

NO.

in the

Supreme Court

of the

United States of America

October Term, 1990

MR. FURNITURE WAREHOUSE INC., ET AL.,

Petitioners,

vs.

BARCLAYS/AMERICAN COMMERCIAL INC., ET AL

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a corporate employer be able to avoid the imposition of an award of punitive damages resulting from the torts of its employee merely because (i) the corporate employer is not shown to have been "independently at fault", or (ii) because the employee who committed the tort is not shown to have been the primary owner or the managing agent of the corporation?

2. If, under Florida law, a corporate employer will be liable for punitive damages resulting from the torts of its employees only if the corporation is shown to be independently at fault or the employee committing the tort is the primary owner or the managing agent of the corporation, will not such a rule be an incentive for the corporate employer to minimize the oversight of its agents?

3. In light of this Court's pronouncements in *Pacific Mutual Life*[1] - and the rationale evidenced in such pronouncements - did the Eleventh Circuit Court of Appeals err in the instant cause when it denied the opportunity to Petitioners to recover an award of punitive damages as against Respondent, on the grounds that Petitioners had not met their burden under *Mercury Motors*[2]?

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[1]*Pacific Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 499 U.S. _____(1991)

[2]*Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981)

4. Does the rule in *Mercury Motors, supra,* violate the due process clause under the Fourteenth Amendment - and is it unconstitutional - in that it requires a finding of "independent fault", where, although it is acknowledged that the state has an interest in minimizing corporate torts, the rule in *Mercury Motors* would encourage corporate torts?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioners: Mr. Furniture Warehouse, Inc., Mr. Wholesale, Inc., Mr. Furniture of Miami, Inc., Mr. Furniture Mart, Inc., Mr. Cars, Inc., Mr. Home Furnishings, Inc., Mr. Property, Inc., Mr. West Palm Furniture, Inc., Mr. Furniture of Florida Holding Company, Inc., Cassett's Furniture, Inc., Mr. Furniture of Fort Lauderdale, Inc. (all of the above corporations, with the exception of Mr. Wholesale, Inc., had operated or do operate under the trade name "Mr. Furniture".); and the Respondent is Barclays-American Commercial, Inc. Barclays American Corporation is the parent of Barclays/American Commercial, Inc.

Those companies having done business under the trade name of "Mr. Furniture" are collectively referred to herein as "Mr. Furniture."

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REFERENCE TO OFFICIAL REPORTS

This Petition for Writ of Certiorari is directed to the following decision: *Mr. Furniture v. Barclays American/Commercial Inc.*, 919 F.2d 1517 (11th Cir. 1990).

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THE COURT IS INVOKED

This petition for Writ of Certiorari seeks review of the opinion of the United States Court of Appeals, Eleventh Circuit, which was entered on December 27, 1990 and is reprinted in a separate Appendix. The Petition for Rehearing was denied pursuant to the Order of the Court of Appeals dated February 7, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.SC. §1254(1).

STATEMENT OF THE CASE

A. Factual background of the Case.

During the times that they were active businesses, those companies operating under the trade name "MR. FURNITURE" were engaged in the retail sale of furniture in the South Florida market. MR. WHOLESALE had been engaged in the wholesale distribution of home furnishings to the MR. FURNITURE stores and other retailers of furniture. Howard Cassett had been the President, Chief Executive Officer and majority shareholder of MR. FURNITURE and MR. WHOLESALE. (R 10 - 195 - 2,3)

The furniture industry is cash-intensive, both for the manufacturer and retailer. (R 5 - 141 - Aff. of Faust, p. 9) Purchasers of furniture like MR. FURNITURE typically cannot survive by paying cash for the goods. Although some manufacturers will extend their own "in-house" trade credit, many manufacturers instead employ the services of a commercial factor. For the furniture industry, one of the largest commercial factors is Respondent, BARCLAYS.

As a commercial factor, BARCLAYS purchases accounts receivable of the manufacturer, usually at a discout, and takes an assignment of the accounts receivable. (R 14 - 258 - 66) In this fashion, the buyer of the goods, *e.g.* MR. FURNITURE, is advised by BARCLAYS to remit payment directly to BARCLAYS. However, before electing to "factor" a given transaction, BARCLAYS makes an independent decision as to the creditworthiness of the buyer, referred to in the industry as the "customer". (R 14 - 258 - 26, 27) If BARCLAYS decides that the customer is not creditworthy, BARCLAYS will so advise the manufacturer of its decision, and the manufacturer - referred to as the "client" - advises the customer that BARCLAYS has declined to factor.

Many of the manufacturers from whom MR. FURNITURE sought to purchase goods utilized BARCLAYS as their factor. BARCLAYS' factoring agreements with those clients (sellers - manufacturers) typically were exclusive in nature, contractually binding the BARCLAYS client to BARCLAYS, *i.e.* the clients agreed to retain BARCLAYS as their sole factor. (R 9 - 183 - Exhibit No. 1).

MR. FURNITURE had always been deemed creditworthy and had been credit approved by all commercial factors. (R 1 - 35) However, commencing in 1986, MR. FURNITURE began regularly receiving advisements from clients of BARCLAYS - and only BARCLAYS - that BARCLAYS had refused to factor those transactions in which MR. FURNITURE and MR. WHOLESALE sought to purchase furniture. One such client of BARCLAYS that had been notified of a credit "turn-down" on MR. FURNITURE was Braxton-Culler, Inc.

Louis Patermo had been a salesman for Braxton-Culler, and was the individual representing B raxton-Culler who had negotiated orders with MR. FURNITURE. (SR 2 - 283 - 3) Upon learning of the credit turn-downs, Mr. Patermo contacted Linda Strickland, the credit officer at BARCLAYS who handled Braxton-Culler's account. Mr. Patermo, on two separate occasions, inquired of Strickland as to why BARACLAYS had refused to credit approve MR. FURNITURE. (SR 2 - 282 - 8, 12) Each time, Strickland

advised Patermo that the reason why BARCLAYS had refused to credit approve MR. FURNITURE was because MR. FURNITURE was raising inventories and credit and was going out of business. (SR 2 - 282 - 9, 13) In the parlance of the industry, this is known as planning a "bust-out".

Upon learning what Strickland had said to Patermo regarding MR. FURNITURE, Howard Cassett then inquired of other furniture salesmen what they had heard about MR. FURNITURE's and MR. WHOLESALE's business reputations in general. (SR 3 - 281 - 56) Many such salesmen - who had begun avoiding doing business with Petitioners - told Mr. Cassett that they too had heard of MR. FURNITURE's plans to do a "bust-out".

Mr. Cassett contacted BARCLAYS to ascertain why BARCLAYS had refused to credit approve Petitioners. After some time, Mr. Cassett was put in touch with Strickland's supervisor, Mr. James Stenhouse, an individual Howard Cassett knew from the past. (JR 17 - 260 - 542)

In 1978, Stenhouse wa a credit officer employed by Southeastern Financial Corporation, BARCLAYS predecessor. (R 14 - 258 - 110) Among the clients Stenhouse had assigned to him were companies that did business with G & M Company ("G&M") and Howard's Furniture Clearance Center, Inc. ("HFCC"). R 14 - 258 - 114) The principal shareholder of these companies had been Mr. Eugene Cassett, father of Howard Cassett. (SR 1 - 283 - 4, 5)

In the 1970's, G&M and HFCC had as their major supplier of furniture a company known as Stuart Furniture Company. (SR 1 - 283 - 8) Stuart Furniture had employed the factoring services of Southeastern Financial Corporation, and Stenhouse was assigned Stuart as one of his accounts. (R 14 - 258 - 114) According to the testimony of Eugene Cassett and Howard Cassett, there came a time when Stenhouse advised Eugene Cassett that Southeastern Financial Corp. would not credit approve a shipment of goods from Stuart Furniture to HFCC and G&M because G&M and HFCC had reached their credit limit with Southeastern Financial Corp. (SR 1 - 283 - 7) Eugene Cassett allegedly begged Stenhouse

for the goods and offered Stenhouse a "two for one payment", *i.e.* if Stenhouse would allow for the release of a shipment of Stuart products, G&M and HFCC would pay Southeastern Financial Corp. twice the amount of such shipment. Stenhouse declined the offer. (SR 1 - 283 - 9) The inability of HFCC & G&M to obtain the Stuart Furniture products allegedly led to the demise of G&M and HFCC, forcing them into bankruptcy. (SR 1 - 283 - 9)

When it became apparent that G&M and HFCC were heading for bankruptcy, Stenhouse called Eugene Cassett and said that he would now accept Mr. Cassett's earlier offer. Eugene Cassett said it was too late. Stenhouse then told Eugene Cassett, "I'll never forget you for this one", and further said that he would get even with Mr. Cassett. (SR 1 - 283 - 9)

In the Chapter 11 Bankruptcy proceedings of G&M and HFCC, Stenhouse's employer, Southeastern Financial Corp. sustained losses exceeding $30,000.00. (R 15 - 259 - 228) Although Stenhouse, himself, would later rise up the corporate ladder at Southeastern Financial, n/k/a BARCLAYS, his employee file maintained by BARCLAYS indicated that his climb up the corporate ladder was not all that easy.

Specifically, the personnel file of Stenhouse, reflects that in April, 1979, Stenhouse's supervisor recommended that Stenhouse be transferred out of the credit department, noting that Stenhouse "substantially fails to obtain expectations." (R 15 - 259 - 206) In addition, in an employee review of Stenhouse, dated September 11, 1979, Stenhouse was denied a promotion, and was again denied promotions and salary increases on September 16, 1979 and August, 1980. (R 15 - 259 - 212, 214) Significantly, these negative performance appraisals followed on the heels of the bankruptcy filing of G&M and HFCC and the resulting loss of $30,00 to Southeastern Financial Corp. It was and is the allegation of Petitioners that Stenhouse carried out on his threats to get even with Mr. Eugene Cassett, Howard Cassett's father, by later using his power at BARCLAYS to see to it that MR. FURNITURE, principally owned by Howard Cassett, and not at all owned by his father, would not be credit approved by BARCLAYS.

B. *Procedural background of the case.*

The issues presented herein derive from an action brought by MR. FURNITURE, MR. WHOLESALE and Howard Cassett aginst BARCLAYS and Stenhouse in the Florida State Court. BARCLAYS caused the removal of the case to the United States District Court for the Southern District of Florida. (R 1 - 1)

The initial Complaint set forth counts for defamation, conspiracy to defame and intentional infliction of emotional stress. Upon motion of BARCLAYS, the lower court dismissed the count for intentional infliction of emotional distress. (R 1 - 15)

MR. FURNITURE later sought and obtained leave from the District Court to join various corporations doing business as MR. FURNITURE, all of which were alleged to have been affected by the complained of defamation. (R 1 - 45) Further, Petitoners likewise obtained leave to amend their Complaint to add two additional counts for antitrust violations. (R 2 - 72)

BARCLAYS then filed, among other things, an Omnibus Motion for Summary Judgment, seeking partial summary judgment as to various claims of the Plaintiffs below. (R 3 - 103) Upon such motion, the District Court granted Partial Summary Judgment as to the Conspiracy to Defame Claims and the Antitrust Claims. (R 10 - 193 - 7) Thus, the case went to jury trial in the District court on the sole remaining count of defamation. At the outset of trial, Howard Cassett was dismissed as a party plaintiff, and during the course of the trial proceedings, James Stenhouse was dismissed as a party defendant.

At the close of MR. FURNITURE's case, BARCLAYS moved for entry of Directed Verdict, and the Court, after entertaining argument, reserved ruling on the Motion. Similarly, the Court reserved ruling on the same Motion made at the close of the evidence.

The jury returned a Special Verdict Interrogatory Form, finding that BARCLAYS had defamed MR. FURNITURE and MR.

WHOLESALE, and awarded nominal damages. (R 13 - 250) Final Judgment was thereafter entered by the District Court in favor of MR. FURNITRUE and MR. WHOLESALE. (R 13 - 254) Further, on the same date Final Judgment was entered, the District Court also entered the Order Granting Directed Verdict on the Question of Punitive Damages. (R 13 - 253) It was from that Order, as well as the Partial Summary Judgment on the Antitrust Claims, that MR. FURNITURE and MR. WHOLESALE filed their appeal in the Eleventh Circuit Court of Appeals.

As it relates to the issues presented herein, the matters before the Appellate Court were: (i) was reversible error committed as a result of an irregularity in the verdict form, in that the verdict form allowed for the jury to award appellants nominal, general or actual damages - which the jury did - but was so structured as to impede the jury's consideration of punitive damages, and (ii) did the lower court err when, after rendition of the verdict, it entered the order granting directed verdict on the question of punitive damages. The Eleventh Circuit noted, however, "It is clear to us, however, that these two grounds for appeal merge into the determination of the propriety of the directed verdict." *Mr. Furniture v. Barclays American/Commercial, Inc.*, 919 F.2d at 1523.

As had the District Court, the Eleventh Circuit based its decision upon the rule as enunciated in the Florida Supreme Court decision in *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981). In the final analysis, the Eleventh Circuit held that MR. FURNITURE was not entitled to have the jury deliberate on an award of punitive damages in its favor because (i) MR. FURNITURE and MR. WHOLESALE had failed to meet their burden under *Mercury Motors, supra,* and (ii) Stenhouse was not the managing agent or primary owner of BARCLAYS, a requirement that needs to be found in accordance with *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla. 1985).

This present Petition for Writ of Certiorari has been filed, seeking a determination that the rule as enunciated in *Mercury Motors* is unconstitutional, violative of the due process clause under the Fourteenth Amendment and conflicts with the recent

rulings and pronouncements of this Court as stated in the case of *Pacific Mutual Life v. Haslip*, 111 S.Ct. 1032, 499 U.S. _____(1991).

ARGUMENT

In the State of Florida, pursuant to the doctrine of *respondent superior*, a plaintiff may recover compensatory damages against a corporate employer for wrongs committed by a corporate employee, provided that the employee committed the complained of act within the course and scope of his employment. *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 549 (Fla. 1981) ("An employer is vicariously liable for *compensatory* damages resulting from the negligant acts of employees committed within the scope of their employment even if the employer is without fault.") [Emphasis in original]. However, in order to recover an award of punitive damages as against the employer resulting from the same unlawful act, a plaintiff must plead and prove that the employer was independently at fault and that such independent fault foreseeably contributed to the plaintiff's injury. *Mercury Motors, Id; Urling v. Helms Exterminators, Inc.*, 464 So.2d 451, 455 (Fla. App. 1st Dist. 1985).

Those acts which may be categorized as independent fault include: (i) having actual or constructive knowledge that the employee would commit the wrong; (ii) improper training of the employee; (iii) improperly supervising the employee; (iv) negligently hiring or retaining the services of the employee, and (v) inducing, authorizing or ratifying the unlawful act of the employee. *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923, 929 (Fla. App. 3 Dist. 1983).

The ostensible rationale for the imposition of this "independent fault" requirement was spelled out in *Mercury Motors*, and may be succinctly stated: Inasmuch as punitive damages go beyond the actual damages suffered by the injured party, and, inasmuch as punitive damages are imposed only as a punishment to the defendant and as a deterrent to others, employers should not be charged with punitive damages unless they foreseeably contributed, *i.e.* were independently at fault, for the wrong complained of. *Mercury Motors, Id.*

An exception to this rule was recognized by the Florida Supreme Court in *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla. 1985). There, the employee that committed the tort was the President and Chairman of the Board of the corporation, Bankers. Under these sets of facts, the *Bankers* Court specifically held that:

> We disavow the contention that *Mercury Motors, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981), is applicable in this case. That decision was not intended to apply to situations where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation.

Bankers Multiple Line Insurance Co., 464 So.2d at 533.

Thus, where the employee committing the wrong is the managing agent or the primary owner of the corporation, liability will be attributed to the corporate employer, and proof of foreseeable, independent fault is not required. See, *e.g. P.V. Construction Corp. v. Atlas Pools of the Palm Beaches, Inc.*, 510 So2d 318 (Fla.App. 4 Dist. 1987) (Corporation not immune from liability for the intentional tort of its president and chief operating officer); *Kent Insurance Co. v. Schroeder*, 469 So.2d 209 (Fla.App. 5 Dist. 1985) (Act of corporate president while acting withing the scope of his employment was indistinguishable from acts of corporation itself, so that corporaion is liable for punitive damages.)

As noted above, in the instant cause, Petitioners were denied the opportunity to recover an award of punitive damages against BARCLAYS because (i) they had not met their burden under *Mercury Motors, supra, i.e.* had failed to demonstrate the requisite "independent fault", and (ii) had failed to prove that Stenhouse was the managing agent or the primary owner of BARCLAYS. Thus, even though the jury had found that BARCLAYS had defamed Petitioners, and, even though punitive damages are otherwise recoverable upon a finding of defamation, BARCLAYS escaped liability for a possible award of punitive damages as against it.

The rationale behind *Mercury Motors, supra,* while at first blush appetizing, does not and should not hold up upon further scrutiny, for such rationale appears to be an invitation to corporations to clandestinely commit willful and wanton torts of all nature and kind, and to avoid liability for punitive damages by claiming that it was not "at fault", that it did not have knowledge of its emplohee's wrongdoing and that the employee was not so high up on the corporate ladder that the employee's acts can be attributed to the corporation. Simply stated, the rule in *Mercury Motors* (taken together with the "exception" in *Bankers)* would allow devious corporations to secretly designate a mid or low-level employee to commit egregious torts and escape liability for punitive damages which might otherwise be properly imposed. Such a rule should not be countenanced by this Court, and, indeed, this Court in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032, 499 U.S. _____ (1991) has apparently rejected such a rule.

In *Pacific Mutual Life, supra,* this Court was presented a constitutional challenge to a large award of punitive damages entered against a corporate employer for the wrongs comitted by one of its agents within the course and scope of his employment. Unlike Florida law, Alabama law (which was the state law at issue), imposed liability upon the corporation for both compensatory and punitive damages for the frauds committed by employees within their scope of their employment.

In discussing whether the imposition of punitive damages advances the State's goal in minimizing fraud, this Court stated:

> Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be presented." *Louis Pizitz Dry Goods Co. v. Yeldell,* 274 U.S. 112, 116 (1927). If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents. Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State's goal. We cannot

say this is a violation of Fourteenth Amendment due process. See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp*, 454 U.S. 556 (1982); *Pizitz*, 274 U.S., at 115.

Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. at ____; 59 LW 4157, 4160 (1991)

As the above-cited language indicates, this Court has acknowledged that a rule requiring a finding of "independent fault" (i) does *not* advance the state's interest in minimizing fraud and corporate oversight of corporate agents and employees, and (ii) will actually lessen the deterrence of fraud - and will, perhaps, even encourage fraudulent and tortious practices. And, indeed, Florida's interest in deterring fraud is no less than Alabama's, so that the requirements set forth in *Mercury Motors, supra*, may be deemed to be violative of the state's interest and violative of the Fourteenth Amendment due process clause.

This Court has long recognized, in a variety of contexts, the need for corporate employers to vigilantly supervise their employees, and has tended to negate rules of law that would otherwise diminish corporate liability for the unlawful acts of corporate employees. Thus, for example, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation* , 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (*"ASME"*) this Court, applying long-established precedent, rejected a claim that a principal should not be liable for the unlawful acts of one of its agents where such acts did not benefit the principal. In *ASME, supra*, the alleged wrong committed by the agent was an antitrust violation. There, the *ASME* court explained its rationale:

> It is true that imposing liability on ASME's agents themselves will have some deterrent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. "[P]ressure

[will be] brought on [the organization] to see to it that [its] agents abide by the law." *United States v. A & P Trucking Co.*, 358 U.S. 121, 126, 79 S.Ct. 203, 207, 3 L.Ed.2d 165 (1958).

ASME, 102 S.Ct. at 1946.

As the requirements of *Mercury Motors, supra,* may very well encourage corporate fraud or wrongdoing or, at the very least, lessen corporate oversight of its agents and employees, this Court should, as it has consistently done in the past, give great scrutiny to these requirements and determine that such requirements are contrary to the state's interest in minimizing fraud and wrongdoing and is otherwise violative of the Fourteenth Amendment due process clause.

CONCLUSION

Petitioners, MR. WHOLESALE, INC. and those separately incorporated entities having done business under the trade name of MR. FURNITURE, believe that, from the authorities cited in this Petition for Writ of Certiorari, the Florida Supreme Court decision in *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981) is unconstitutional, conflicts with this Court's pronouncement in the recent case of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 499 U.S. _____1991) and is violative of the due process clause of the Fourteenth Amendment, in that it impinges upon the state's interest to minimize corporate fraud and wrongdoing generally. As a consequence, it is respectfully requested that this Court accept jurisdiction of this cause and grant the Petition for Writ of Certiorari herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true copies of the Petition for Writ of Certiorari were mailed to Kenneth B. Robinson, Esquire, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 500 East Broward Boulevard, Suite 1350, Fort Lauderdale, Florida 33394, (305) 765-0500, this 8th day of May, 1991.

SHELDON ROSENBERG, ESQ.

90-1839

(2)

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Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

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MR. FURNITURE WAREHOUSE, INC.,
Mr. Wholesale, Inc., Howard Cassett,
Plaintiffs-Appellants,

v.

BARCLAYS AMERICAN/COMMERCIAL INC.,
Stenhouse, James a/k/a, Jim Stenhouse,
Defendants-Appellees
No. 89-5290

United States Court of Appeals,
Eleventh Circuit

Dec. 27, 1990.

Furniture buyer brought antitrust and defamation suit against commercial factor. The United States District Court for the Southern District of Florida, No. 87-00620-CIV-LCN, Lenore Carrero Nesbitt, J., 708 F.Supp. 331, entered judgment for factor, and appeal was taken. The Court of Appeals, Anderson, Circuit Judge, held that: (1) buyer did not have antitrust standing, and (2) factor was not liable for punitive damages.

Affirmed.

1. Monopolies

Factors to consider in determining whether party had standing to bring antitrust action include direction of defendant's anticompetitive intent, causal connection between alleged antitrust violation and injury, nature of injury, including whether injury is of kind that antitrust laws were intended to redress, and directness or indirectness of injury, including existence of identifiable class of persons who are more direct victims and including problem of duplicative recovery or complex apportionment of damages. Sherman Anti-Trust Act, § 4, 15 U.S.C.A. § 15.

2. Monopolies

Furniture purchaser lacked standing to bring antitrust action against commercial factor, whose exclusive contracts with furniture manufacturers allegedly had anticompetitive effect on factored credit market; factor's denial of credit to purchaser had no relationship to factor's allegedly anticompetitive purpose of excluding competing factors. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 15.

3. Monopolies

Statutory proscription on monopolization and attempts to monopolize may embrace unilateral refusal to deal when accompanied by intent to monopolize and requisite degree of market power; monopolistic or other anticompetitive intent is key factor in determining whether statutory violation has occurred. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

4. Monopolies

In order to constitute violation of antitrust law, monopolist's refusal to deal must tend to cause harm to competition; unrelated harm to individual competitor or consumer is not sufficient. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

5. Monopolies

Monopolist's refusal to deal becomes actionable under antitrust laws only where refusal is designed to have anticompetitive effect, whether to gain greater market share, to drive up prices, or to obtain some other illegal goal. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

6. Monopolies

Furniture buyer lacked standing to challenge commercial factor's refusal, as alleged monopolist, to deal with it absent allegation that factor's refusal to extend credit was attempt to

garner more market share or to accomplish any other anticompetitive end. Sherman Anti-Trust Act, §§ 2, 4, 15 U.S.C.A. §§ 2, 15.

7. Corporations

Fault for purposes of imposition of punitive damages on corporation must be fault on part of managing agent or primary owner of corporation.

8. Federal Courts

Directed verdict will be reversed on appeal only if there is evidence of such quality and weight that reasonable and fair-minded jurors in exercise of impartial judgment might reach different conclusion, opposed to motion for directed verdict.

9. Corporations

Commercial factor was not at fault for employee's defamatory statement, and thus could not be held liable for punitive damages; employee's statement was not attributable to assistant vice-president, who allegedly diskliked plaintiff and, in any event, assistant vice-president was not managing agent of factor.

Sheldon Rosenberg, Michael Rothman, North Miami, Fla., for plaintiffs-appellants.

Kenneth B. Robinson, Byron G. Petersen, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Ft. Lauderdale, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT and ANDERSON, Circuit Judges, and GODBOLD, Senior Circuit Judge.

ANDERSON, Circuit Judge:

In February of 1986, appellants Mr. Furniture Warehouse, Inc. and Mr. Wholesale, Inc., related companies involved respectively in the retail and wholesale furniture business in south Florida (collectively referred to as "Mr. Furniture"), filed a complaint, as amended, against appellee Barclays American/Commercial, Inc. ("Barclays"). The complaint alleged defamation, violations of Sections 1 and 2 of the Sherman Act, and other torts held to be without merit and dismissed by the district court. Howard Cassett, president of Mr. Furniture, and James Stenhouse, a Barclays employee, were originally parties to the lawsuit but were dismissed as such by the district court. The district court entered summary judgment in favor of Barclays on the antitrust claims on the ground that Mr. Furniture lacked standing. 708 F.Supp. 331 (1988). R10-193. The defamation count resulted in a jury verdict finding for Mr. Furniture but awarding only nominal damages based on a verdict form that excluded the issue of punitive damages from the jury's consideration. After the verdict, the district court directed a verdict for Barclays on the punitive damages issue. R13-253. Mr. Furniture appeals, arguing that the district court erred on the standing issue and that the jury should have been given the opportunity to award punitive damages. We hold that the district court properly denied Mr. Furniture antitrust standing and correctly directed the verdict as to punitive damages.

I. FACTS

In the furniture industry, purchasers of furniture like Mr. Furniture often buy from manufacturers on credit. Frequently, this credit is extended not by the furniture manufacturer itself, but rather by an institution in the business of commercial factoring. Barlcays, as a commercial factor, purchases accounts receivable from furniture manufacturers, usually at a discount, and assumes the collection responsibilities. Where an account is purchased on a non-recourse basis, the factor also assumes the risk of non-payment. In orer to minimize this risk, Barclays and other factoring institutions are sensitive to a furniture purchaser's credit rating and other attributes indicating an ability to pay.

It is undisputed that Barclays is a major, perhaps even the dominant, factor in the south Florida market and that Barlcays has entered into a series of exclusive factoring arrangements with many of the manufacturers from which Mr. Furniture buys. It is also undisputed that Barclays has refused to extend credit to Mr. Furniture, either because of Barclays' perception of Mr. Furniture's credit worthiness, or, as Mr. Furniture claims, because of personal animosity between James Stenhouse of Barclays and Howard Cassett of Mr. Furniture. Although Mr. Furniture is free to pay cash for furniture or to arrange for credit from other sources, Barclays' refusal to provide credit has precluded Mr. Furniture from purchasing furniture from manufacturers which factor exclusively with Barclays on credit terms favored by Mr. Furniture. The resulting injury to Mr. Furniture's business is the basis for the antitrust counts.

The defamation count arose from a statement made by Linda Strickland, a Barclays employee, to a sales representative for a furniture manufacturer that Mr. Furniture was "raising inventories and credit to go out of business." SR2-9,13.

II. DISCUSSION

A. *Antitrust Standing*

Under Section 4 of the Clayton Act, 15 U.S.C.A. § 15 (Supp.1990), "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws my sue ..." for treble damages. This broad formulation has been judicially circumscribed, *inter alia*, by requiring a plaintiff to demonstrate what has been termed "antitrust standing." *See Associated Gen. Contractors of Cal. v. Cal. St. Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983). Although the concept of antitrust standing has proved to be somewhat elusive, *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478, 102 S. Ct. 2540, 2547, 73 L.Ed.2d 149 (1982), the Supreme Court and this court have prescribed general principles to guide the standing analysis.

[1] In *Assoc. Contractors*, the Court applied a series of

interrelated factors in addressing the issue whether the plaintiff union had standing to bring an antitrust action against contractors who were allegedly exerting pressure on other contractors and subcontractors to hire only non-union labor: (1) intent; (2) the causal connection between the alleged antitrust violation and the injury; (3) the nature of the injury, including whether the injury is of the kind that the antitrust laws were intended to redress; and (4) the directness or indirectness of the injury, including the existence of an identifiable class of persons who are more direct victims, and including the problem of duplicative recovery or complex apportionment of damages.[1]

We will apply these factors to Mr. Furniture's claims under both §§ 1 and 2 of the Sherman Act. The issue of antitrust standing must be tested by reference to the allegations of the complaint. *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1497(11th Cir.1984), *cert.denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912(1986); *Construction Aggregate Transport, Inc. v. Florida Rock Ind., Inc.* 710 F.2d 752, 763 (11th Cir. 1983).

1. Section 1 of the Sherman Act

Section 1 of the Sherman Act, 15 U.S. C.A. § 1 (Supp.1990) provides, in pertinent part:

Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal....

1. This circuit has traditionally applied a "target area" test that embraces substantially the same factors. In *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1496 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107, 106 S.Ct., 1513, 89 L.Ed.2d 912 (1986), we held that our "target area" test does not produce materially different results from application of the *Associated Contractors* guidelines. Under either test, the key factors are "the physical and economic nexus between the alleged violation and the harm to the plaintiff, and ... the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under §4." *McCready*, 457 U.S. at 478, 102 S. Ct. at 2547-48. *Amey*, 758 F.2d at 1496-97.

Mr. Furniture's complaint alleges that Barclays violated § 1 by garnering an increasing percentage of the market for factored credit through its exclusive contracts with furniture manufacturers. Thus, the complaint continues, because Barclays has refused to extend credit to Mr. Furniture, Mr. Furniture is precluded from purchasing furniture with advantageous factored credit from an ever increasing number of furniture manufacturers. To support its argument that this injury is an antitrust injury directly caused by the alleged § 1 violation, Mr. Furniture relies on *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). Thus, we must examine the facts and holdings of *McCready* to gauge the strength of Mr. Furniture's argument.[2]

Carol McCready was the recipient of health insurance benefits provided by her employer through Blue Shield of Virginia. Generally, the group health plan reimbursed a portion of the cost of psychotherapy performed by psychiatrists but not if the treatment was provided by psychologists. After McCready received such treatment from a psychologist, she submitted a claim to Blue Shield which was denied. McCready then filed a class action on behalf of psychotherapy patients who had similarly been denied reimbursement seeking treble damages under § 4 of the Clayton Act. McCready alleged that she and others had been injured as a result of a conspiracy between Blue Shield and a Virginia psychiatry association designed to exclude psychologists in violation of § 1 of the Sherman Act.

The Supreme Court held that McCready had antitrust standing because she was injured as a direct result of the anticompetitive scheme. Denying reimbursement to patients who were treated by psychologists was necessary to accomplish the desired result-the exclusion of psychologists-because beneficiaries of the Blue Shield plan would be forced either to go to psychiatrists or to forego reimbursement. Thus, the Court concluded that

2. For purposes of this standing analysis and to separate the standing issue from the merits of the antitrust claims, we will assume that a violation of § 1 of the Sherman Act has in fact occurred.

McCready's injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *McCready*, 457 U.S. at 484, 102 S.Ct. at 2551.

[2] Mr. Furniture argues that although the primary victims of Barclays' activities are other factoring institutions, it is in a position analogous to McCready. A closer examination of the facts of the instant case, however, reveals that Mr. Furniture's injury is far more remote than was McCready's. Assuming, *arguendo*, but expressly not deciding, that Barclays' exclusive contracts with manufacturers are in violation of § 1 and have an anticompetitive effect in the factored credit market, Mr. Furniture's injury does not flow therefrom. Unlike *McCready*, the denial of credit to Mr. Furniture is not a necessary component of the alleged anticompetitive purpose of Barclays to exclude competing factors. If Barclays' activities are in violation of § 1, the violation is not furthered in the least by refusing to extend credit to Mr. Furniture. In fact, there is no suggestion that the denial of credit to Mr. Furniture had any relationship at all to Barclays' alleged anticompetitive purpose of excluding competing factors. Thus, the injury suffered by Mr. Furniture was not the kind of injury "about which Congress was likely to have been concerned." *McCready*, 457 U.S. at 478, 102 S.Ct. at 2548. The Supreme Court in *McCready* acknowledged the importance of this factor, but found that the injury suffered there "was of a type that Congress sought to redress." 457 U.S. at 483, 102 S.Ct. at 2550. Blue Shield's anticompetitive scheme directly depended on refusing to reimburse recipients of pschological services, and McCready's injury was inextricably intertwined with the injury which the conspirators sought to inflict on psychologists. We conclude that the instant case is unlike *McCready*. Mr. Furniture's injury was not caused by the alleged anticompetitive conduct directed against the other factors, did not further that activity, and in fact had no relation to it. Thus, the nexus between the assumed § 1 violation and Mr. Furniture's injury is insufficient to confer standing in this case.

The foregoing discussion establishes that two of the *Associated General* factors (*i.e.*, the causal connection between the alleged antitrust violation, and the nature of the injury including in

particular whether the injury is of the kind that was of concern to Congress) point to a lack of standing.[3] In addition, it is clear that Barclays' anticompetitive intent was directed at the competing factors, and not at Mr. Furniture. Finally, the presence of more direct victims, *i.e.*, the other commercial factors, also supports our conclusion that Mr. Furniture has no standing to assert a § 1 claim.

An examination of the real cause of Mr. Furniture's injury reveals that any possibility of standing would have to be based on § 2 of the Sherman Act. This is because the complaint essentially alleges a unilateral refusal to deal by a monopoly rather than a concerted action refusing to deal. *See national Indep. Theatre Exhib., Inc. v. Charter Fin. Grouup, Inc.*, 474 F.2d 1396, 1402 (11th Cir.1984) (Section 1 of the Sherman Act does not proscribe independent action refusing to deal), *cert. denied sub nom., Patterson v. Charter Fin. Group, Inc., 471 U.S. 1056, 105 S.Ct. 2120, 85 L.Ed.2d 484 (1985).*

2. Section 2 of the Sherman Act

Section 2 of the Sherman Act, 15 U.S.C.A. § 2 (Supp.1990) provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

Mr. Furniture's complaint essentially alleges that Barclays' monopoly position in the market for factored credit coupled with Barclays' refusal to deal constitutes a violation of § 2. For purposes of this standing analysis, we will assume, but expressly not decide, that Barclays does indeed have such a monopoly position. It is undisputed that Barclays has refused to deal with Mr. Furniture.

3. We need not decide whether those two factors are dispositive, since other *Associated General* factors also indicate a lack of standing.

[3] The record reveals that Barclays' actions are the product of unilateral decision making, motivated by animosity or bad credit or both. "A unilateral refusal to deal is [generally] not unlawful." *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 860 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981).[4] Under certain circumstances, however, even a unilateral refusal to deal may constitute a violation of § 2. The proscription on monopolization and attempts to monopolize may embrace a unilateral refusal to deal "when accompanied by the intent to monopolize and the requisite degree of market power...." *National Indep. Theatre Exhib.*, 747 F.2d at 1402 (citing *Otter Tail Power Co. v United States*, 410 U.S. 366, 377-78, 93 S.Ct. 1022, 1029-30, 35 L.Ed.2d 359 (1973)). *See also California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001, 1003-04 (9th Cir.1981) (citing *Times-Picayune v. United States*, 345 U.S. 594, 625, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953)). It is clear that monopolistic or other anticompetitive intent is the key factor in determining whether a violation of § 2 has occurred. *See Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1388 (5th Cir.), *cert, denied sub nom., Woodlands Tel. Corp. v. Southwestern Bell Tel. Co.*, 449 U.S. 912, 101 S. Ct. 286, 66 L.Ed.2d 140 (1980); *Poster Exchange, Inc. v. National Screen Service Corp.* 431 F.2d 334 (5th Cir.1970), *cert. denied*, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed.2d 811 (1971).

[4] In *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919), the Court stated:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal....

4. This case was decided prior to the close of business on September 30, 1981, and is binding precedent in this circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

This principle is also embraced in the notion that to constitute a violation the monopolist's activities must tend to cause harm to competition; unrelated harm to an individual competitor or consumer is not sufficient. *UNR Industries, Inc. v. Continental Ins. Co.*, 623 F.Supp. 1319, 1328 (N.D.Ill.1985). For example, in *Construction Aggregate transport, Inc. v. Florida Rock Ind., Inc.*, 710 F.2d 752 (11th Cir.1983), we found antitrust standing on behalf of the victim of a refusal to deal that was designed to have an anticompetitive effect on the relevant market.

[5] A monopolist's refusal to deal becomes actionable under the antitrust laws only where the refusal is designed to have an anticompetitive effect, whether to gain greater market share, to drive up prices, or to obtain some other illegal goal. [5] *See "Mid-Texas Communications*, 615 F.2d at 1385-86. Limiting § 2 to these situations effectuates the legislative purpose behind the act, which is "to assure...the benefits of price competition," not to serve as a "balm for all wrongdoing in the business community." *Associated Gen. Contractors of California v. Cal. St. Council of Carpenters*, 459 U.S. 519, 538, 103 S.Ct. 897, 908, 74 L.Ed.2d 723 (1983); *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 751 (9th Cir.1984) (Kennedy, J., dissenting), *cert. dismissed*, 469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985).

[6] In the instant case, appellant does not allege nor do we construe Barclays' refusal to extend credit to be an attempt to garner more market share or to accomplish any other anticompetitive end. "It requires a long stretch to call an individual refusal to deal 'monopolizing' when it does nothing to increase the refuser's monopoly power and nothing to increase his position in any market." P. Areeda, *Antitrust Law* ¶ 736, at 274 (1978). Although Mr. Furniture may "feel oppressed because [it] lacks the alternative sources [of factored credit with certain furniture manufactures] that competition would provide if it existed," *id.*, ¶ 736, at

5. Even where there is concerted action refusing to deal, an anticompetitive purpose or effect would still be a necessary element of a Sherman Act violation. *See Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 860-61 (5th Cir.) *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981) (quoting *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1115 (5th Cir.1979)).

271, this is not an injury cognizable under the antitrust laws in the absence of a purpose to affect, or an effect in, the relevant markets. In other words, Mr. Furniture's injury is not of the kind that the antitrust laws were intended to forestall.[6] It is also clear that Mr. Furniture was not the object of any anticompetitive intent.

For the foregoing reasons, we conclude that Mr. Furniture has not standing to assert a claim under § 2 of the Sherman Act.

B. *The Punitive Damages Issue*

Appellant Mr. Furniture alleges that the district court committed error with regard to the punitive damages issue in two respects. First, Mr. Furniture claims that the verdict form submitted to the jury was flawed because it did not allow the jury to consider an award of punitive damages. Second, appellant urges us to reverse the district court's directed verdict on this issue, which was entered after the jury returned with a verdict finding defamation *per se* but awarding only nominal damages. It is clear to us, however, that these two grounds for appeal merge into the determination of the propriety of the directed verdict.[7]

6. As the discusion in the text implies, this lack of an antitrust injury also indicates that Barclays has not violated § 2 at all. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) (failure to prove antitrust injury prevents recovery of damages). That failure, however, is also indicative of a lack of standing. In *Associated Contractors*, 459 U.S. at 538-39, 103 S.Ct. at 908-09, the Supreme Court cited *Brunswick* for the proposition that, as part of an antitrust standing analysis, "the alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall." The fact that Mr. Furniture's lack of an antitrust injury demonstrates the absence of an antitrust violation renders problematic the application of some of the *Associated General* guidelines for determining standing. For example, it is difficult to examine the causal connection between the antitrust violation and the injury (as well as the directness of the injury) where there is no antitrust violation. Suffice it to say, however, that Mr. Furniture has failed to demonstrate that its injury was caused by Barclay's violation of § 2. Moreover, we do not interpret *Associated Contractors* to require that all of its guidelines be met.

7. We find no merit in Mr. Furniture's contention that the district court's failure to permit deliberation on punitive damages may have affected the jury's calculation of general damages.

The district court based its directed verdict on *Mercury Motors Exp., Inc. v. Smith*, 393 So.2d 545 (Fla.1981). In *Mercury Motors*, the Florida Supreme Court enunciated the following principles of law:

> (1) An employer is vicariously liable for *compensatory* damages resulting from the negiligent acts of employees committed within the scope of their employment even if the employer is without fault. This is based upon the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even through it means placing vicarious liability on an innocent employer. (2) Punitive damages, however, go beyond the actual damages suffered by an injured party and are imposed only as a punishment of the defendant and as a deterrent to others. (3) Before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part. (4) Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages.

Id. at 549 (emphasis in original).

[7] In the instant case, Mr. Furniture claims that the requirements of *Mercury Motors* are satisfied because it presented sufficient evidence that Linda Strickland's defamatory statement was either known to or directed by James Stenhouse, Strickland's superior in the corporate hierarchy at Barclays. In order to prevail on this claim, Mr. Furniture must show no only fault on the part of Stenhouse, but also that Stenhouse was of sufficient stature at Barclays to attribute his fault to Barclay. This latter requirement is derived from *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 533 (Fla.1985), where the court held that fault for purposes of imposition of punitive damages on a corporation must be fault on

the part of a managing agent or primary owner of the corporation.

[8,9] We will reverse the directed verdict only if we find that "there is substantial evidence, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, opposed to the motion for directed verdict." *Worsham v. A.H. Robins Co.* 734 F.2d 676, 681 (11th Cir.1984). Therefore, we will affirm the district court unless Mr. Furniture's evidence is substantial on two issues: (1) that Stenhouse was a managing agent or primary owner of Barclays; and (2) that Strickland's defamatory statement is traceable to Stenhouse. Our review of the record in light of Florida precedent convinces us that Mr. Furniture has failed to meet this burden of proof with respect to both issues.

James Stenhouse is a unit manager in Barclays' furniture credit department and an assistent vice president at Barclays. R14-14 to 16. Stenhouse is one of approximately twenty assistant vice presidents and is subordinate to thirty vice presidents and senior vice presidents. Although Stenhouse is the director of furniture credit at one of Barclays' offices, Charlotte, he has no responsibility for approving factored credit for other industries for which Barclays is a factor. R14-56,57. In addition, Stenhouse does not participate in the formation of company policy. R14-17. Of course, there is no contention that Stenhouse is an owner of Barclays. An examination of Stenhouse's position in light of Florida precedent persuades us that he is not a managing agent.

In *P.V. Constr. Corp. v. Atlas Pools of Palm Beaches, Inc.*, 510 So.2d 318 (Fla. Dist. Ct.App.1987), the court imposed punitive damages liability on a corporation for the intentional tort of its *president and chief operating officer*. Stenhouse's position clearly does not have the stature. We find that Stenhouse is more like the director of the Eastern Air Lines' news bureau in *Eastern Air Lines, Inc. v. Gellert*, 438 So2d 923 (Fla.Dist.Ct.App.1983), where the court refused to impose corporate punitive damages liability for the director's defamatory remarks. *See also Pier 66 Co. v. Poulos*, 542 So.2d 377 (Fla.Dist.Ct.App.) (no corporate punitive damages on defamation claim because hotel president was not a managing agent), *review*

denied, 551 So.2d 462 (Fla.1989).

Because we hold that Stenhouse is not a managing agent, we conclude that the verdict on the punitive damages issue was properly directed by the district court. However, even if we were to assume that Stenhouse is a managing agent at Barclays, we still would affirm the district court. The only evidence presented by Mr. Furniture attributing fault to Stenhouse for Strickland's defamatory comment was that there may be a history of personal animosity between Stenhouse and Howard Casset, Mr. Furniture's president.[8] This evidence is insufficient to draw a reasonable inference of fault on the part of Stenhouse which foreseeably contributed to the alleged defamatory comment.

AFFIRMED.

8. Mr. Furniture's contention that the very fact that Stenhouse was involved with the Mr. Furniture account raises an inference that he also knew or approved of Strickland's statement is unsupported by the record. Testimony adduced at trial does indicate that Stenhouse knew about Mr. Furniture's credit difficulties despite the fact that Strickland had authority to approve credit for Mr. Furniture without consulting Stenhouse. However, the testimony also shows that Stenhouse did not learn of Mr. Furniture's problem until August or September of 1986, R14-149, some months after the defamatory statement, which was made in June or July of 1986. SR2-9.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5290

MR. FURNITURE WAREHOUSE, INC., ET AL
MR. WHOLESALE, INC., ET AL
HOWARD CASSETT,

Plaintiffs-Appellants,

versus

BARCLAYS AMERICAN/COMMERCIAL, INC., ET AL
JAMES STENHOUSE a/k/a Jim Stenhouse,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(February 7, 1991)

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for rehearing filed by appellants, Mr. Furniture and Mr. Wholesale, is Denied.

ENTERED FOR THE COURT:

S/S R. L. Anderson
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-620-Civ-NESBITT

ORDER GRANTING DIRECTED VERDICT ON QUESTION OF PUNITIVE DAMAGES

MR. FURNITURE WAREHOUSE, INC., ET AL,

Plaintiffs,

vs.

BARCLAYS AMERICAN/COMMERCIAL, INC., ET AL

Defendant.

At the close of Plaintiffs' case-in-chief in this two-week jury trial, the Court deferred ruling on Defendant's motion for directed verdict. Defendant has withdrawn its motion with respect to every issue except the question of punitive damages. Under Fed. R. Civ. P. 50 (a), the Court should direct a verdict if reasonable jurors could not arrive at a contrary verdict, considering the evidence in the light most favorable to the Plaintiff. *Cora Pub., Inc. v. Continental Cas. Co.*, 619 F.2d 482, 484 (5th Cir. 1980).

As to the question of punitive damages, the Court finds that plaintiffs have not met their burden under *Mercury Motors exp., Inc. v. Smith*, 393 So.2d 545 (Fla. 1981). Specifically, the Court finds that there is no evidence in the record from which a reasonable jury could possibly infer that Barclays should be held vicariously liable for defamatory statements made by its employees. Plaintiffs have not produced any evidence even tending to show that the employees' misconduct was willful and wanton, and that Barclays was in

some way at fault for negligently hiring or supervising those employees. Because Plaintiffs rely "entirely upon the master-servant relationship to make the mployer vicariously liable for punitive damages," Plainfiffs are not entitled to have a jury consider the question of punitive damages. *Mercury Motors*, 393 So.2d at 459.

For the above-stated reasons, it is hereby

ORDERED and ADJUDGED that Defendant's motion for directed verdict on the question of punitive damages is GRANTED.

DONE and ORDERED in chambers, Miami, Florida, this 28th day of February, 1989.

S/S Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: Sheldon Rosenberg, Esq.
Kenneth B. Robinson, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-0620-CIV-NESBITT

FINAL JUDGMENT

MR. FURNITURE WAREHOUSE, INC., ET AL, MR. WHOLESALE, INC., ET AL.,

Plaintiffs,

v.

BARCLAYS AMERICAN/ COMMERICAL, INC., ET AL

Defendant.

Count I of Plaintiffs' Verified Complaint having been tried before a jury during the two week period commencing February 14, 1989, and the jury having rendered and signed a Verdict Form on February 27, 1989, it is hereupon,

ORDERED AND ADJUDGED as follows:

Final Judgment is hereby entered in favor of Plaintiffs, MR. FURNITURE WAREHOUSE, INC., et al, MR. WHOLESALE, INC., et al., and against Defendant, BARCLAYS AMERICAN/ COMMERCIAL, INC., et al., for nominal damages in the amount of Ten Dollars ($10.00), for which let execution issue.

The Court retains jurisdiction of this cause to tax costs upon appropriate motion of either of the parties or to award attorneys' fees, if applicable, upon motion of the parties.

The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 28th day of February, 1989

S/S Lenore C. Nesitt
United States District Court Judge

Copies To:

Byron G. Petersen, Esq.
Sheldon Rosenberg, Esq.

(3)

90-1839

Supreme Court, U.S.
FILED
JUN 28 1991
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MR. FURNITURE WAREHOUSE, INC., ET AL.

Petitioners,

v.

BARCLAYS AMERICAN/COMMERCIAL, INC., ET AL.

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF MR. FURNITURE WAREHOUSE, INC., ET AL., FOR WRIT OF CERTIORARI

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15pp

QUESTION PRESENTED FOR REVIEW

(1) Whether the Eleventh Circuit Court of Appeals properly determined, under Florida law, that punitive damages were not available against Respondent in the proceeding below because Petitioner had presented no evidence from which a reasonable jury could find that Respondent should be held vicariously liable for such damages for the conduct of an employee who was neither a managing agent of Respondent nor even at fault for the underlying tort.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mr. Furniture Warehouse, Inc., Et Al.

Petitioners,

v.

Barclays American/Commercial, Inc., et al.

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF MR. FURNITURE WAREHOUSE, INC. ET AL., FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE AND FACTS

Respondent BARCLAYS AMERICAN/ COMMERCIAL, INC. ("BARCLAYS") is a commercial factor which purchases the accounts receivable of third parties, its clients, who are generally manufacturers or wholesalers of goods, including furniture, and advances the amount of the receivables to its clients for a fee. (R3-113 Patterson *Aff. ¶¶4, 5*). In accepting or purchasing a particular receivable BARCLAYS makes a preliminary decision whether such purchase will be on a "credit approved" basis. By factoring on a "credit approved" basis, BARCLAYS agrees to assume the credit risk on payment of such receivable. (R3-113 Patterson *Aff. ¶6*) If the obligor on the receivable, the retail or wholesale purchaser of goods from BARCLAYS' client, fails to pay, BARCLAYS suffers the economic loss (R14-258-8).

Petitioners, companies operating under the trade name "MR. FURNITURE," are engaged in the retail sale of furniture in South Florida. At various times between 1981 and 1987, BARCLAYS declined to factor, on a credit approved basis, MR. FURNITURE's purchase orders submitted for factoring by furniture manufacturers who used BARCLAYS as their factor.

Decisions as to whether receivables will be factored on a "credit approved" basis are made by various credit officers and assistants within BARCLAYS' "credit units." (R3-113 Stenhouse *Aff. ¶5*). These units are divided by industry, and individual credit officers and assistants within the units are assigned responsibility for specific clients. (R3-113 Stenhouse *Aff. ¶4*)

Each credit unit has a unit head, who is required to approve requests for credit which exceed a certain amount.

(R14-258-111) James Stenhouse ("Stenhouse") is a unit head in BARCLAYS' furniture credit department and an assistant vice president of BARCLAYS. (R14-14 to 16) Stenhouse is one of approximately twenty assistant vice presidents, subordinate to thirty vice presidents and senior vice presidents (R14-258-15). Stenhouse does not participate in the formulation of company policy (R14-17) and has never even participated in any meetings with members of BARCLAYS' senior management. (R14-258-113).

One of MR. FURNITURE's requests for credit approval reached Linda Strickland ("Strickland"), a BARCLAYS credit officer and a subordinate to Stenhouse. During a conversation with a sales representative for the furniture manufacturer with whom MR. FURNITURE had placed the order in question, Strickland allegedly stated that MR. FURNITURE was "building up inventory and credit limits to go out of business." (SR2-282-9). Some months later, Stenhouse was contacted by the principal of MR. FURNITURE and learned for the first time of MR. FURNITURE's existence and its previous inability to obtain credit approval from BARCLAYS. (R14-149; R15-259-149; R15-259-196).

In February 1987, MR. FURNITURE brought suit against BARCLAYS and Stenhouse for, *inter alia*, defamation based on Strickland's statement, and sought punitive damages. Notwithstanding the fact that Stenhouse had no involvement with MR. FURNITURE until after the defamatory statement, MR. FURNITURE claimed that Stenhouse somehow either knew of or directed Strickland's comment, as a result of alleged past personal animosity toward MR. FURNITURE's president and his family. Stenhouse was later dismissed, however, as a defendant.

The defamation claim proceeded to trial solely against BARCLAYS on a theory of *respondeat superior*. The jury found in favor of MR. FURNITURE as to Strickland's statement but awarded only nominal damages. (R18-261-643). After the verdict, the District Court directed a verdict for BARCLAYS on the punitive damages issue, finding that the record contained no evidence from which a reasonable jury could determine that BARCLAYS should be held vicariously liable under Florida law for Strickland's defamatory statement. (R13-253).

MR. FURNITURE appealed to the Eleventh Circuit Court of Appeals, contending, to the extent relevant here, that the District Court erred in granting a directed verdict on the punitive damages issue. MR. FURNITURE (a) repeated its unsupported allegation that Strickland's statement was either known to or directed by Stenhouse and (b) suggested in turn that Stenhouse was of sufficient stature at BARCLAYS to permit attribution of his alleged fault to BARCLAYS for purposes of punitive damages liability.

The Eleventh Circuit affirmed the directed verdict. Applying Florida law, which prohibits imposition of punitive damages under the doctrine of *respondeat superior* in the absence of fault on the part of a managing agent or primary owner of the corporate employer, the Eleventh Circuit held that Stenhouse was not a managing agent of BARCLAYS and that Strickland's statement was not in any event traceable to Stenhouse.

SUMMARY OF ARGUMENT

MR. FURNITURE's Petition for Writ of Certiorari suggests that the criteria in Florida for imposition of punitive damages under the doctrine of *respondeat superior*,

established by the Florida Supreme Court in *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981) and applied by the Eleventh Circuit below, somehow violate the Due Process Clause of the Fourteenth Amendment. MR. FURNITURE failed to raise its "constitutional claim" in either the District Court or the Court of Appeals and thus such claim is not properly before this Court. In any event, MR. FURNITURE has no due process right to a federally imposed expansion of the punitive damage doctrine applied in Florida, and thus its Petition for Writ of Certiorari should be denied.

ARGUMENT

I. MR. FURNITURE'S PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE IT IS PREMISED UPON AN ISSUE NOT RAISED OR ADDRESSED BELOW AND REQUESTS, UNDER THE GUISE OF DUE PROCESS, THAT THE COURT IMPOSE A BLANKET RULE REQUIRING FLORIDA TO IMPOSE PUNITIVE DAMAGES IN VICARIOUS LIABILITY SITUATIONS.

Under Florida law, as enunciated by the Florida Supreme Court, before a corporate employer may be held vicariously liable for punitive damages under the doctrine of *respondeat superior*, there must be proof of some fault on the part of a managing agent or primary owner of the corporation. *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 533 (Fla. 1985); *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 549 (Fla. 1981). The Florida legislature has been applying this common law principle for several years and it remains intact.

Against this backdrop, MR. FURNITURE generically questions the wisdom of this rule as a matter of policy, Petition for Writ of Certiorari at *i¶¶1,2,* and more specifically suggests that Florida's decision not to make punitive damages against corporate employers more broadly available somehow violates the Due Process Clause of the Fourteenth Amendment. *Id.* at ¶3. Relying upon this Court's recent decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 499 U.S. ___ (1991), in which the Court held that an Alabama rule imposing punitive damages under the doctrine of *respondeat superior* without requiring fault did not violate the employer's due process rights, 111 S. Ct. at 1041, MR. FURNITURE suggests that the absence of an identical rule in Florida constitutes a due process violation. As demonstrated below, these contentions are not properly before the court, turn *Haslip* on its head, and accordingly do not raise a legitimate due process issue.

A. MR. FURNITURE FAILED TO RAISE ITS DUE PROCESS CLAIM IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS IS PRECLUDED FROM RAISING IT AT THIS TIME

MR. FURNITURE did not raise its due process argument in either the District Court or the Court of Appeals. This claim is thus not properly before this Court. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 757, 109 S. Ct. 2909, 2921 (1989) (Court declined to consider due process challenge to punitive damage award where petitioner failed to raise due process claim before District Court or Court of Appeals); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977) (Court would not consider claim not pleaded, argued or briefed in either the District Court or Court of Appeals); *Tennessee v. Dunlap*,

426 U.S. 312, 316 n.3 (1976) (same); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) (same).[1/]

B. MR. FURNITURE PERVERTS *HASLIP* AND REQUESTS THAT THE COURT REQUIRE FLORIDA TO EXPAND THE AVAILABILITY OF PUNITIVE DAMAGES TO SITUATIONS IN WHICH FLORIDA HAS CHOSEN NOT TO IMPOSE THEM

In *Haslip*, the Court expressed considerable concern about the scope and potentially unlimited *expansion* of punitive damage awards. 111 S. Ct. at 1038-1040. Faced with an existing Alabama rule, however, permitting punitive damage liability under the doctrine of *respondeat superior* without an independent showing of fault by a managing agent or owner so long as the employee acted within the scope of his employment, the Court, in deference to state prerogative, held that such rule was a rational exercise of the state's authority. *Id.* at 1041. By no stretch of the imagination did this Court hold that this rule was constitutionally mandated in the first instance or that other states were required to dispense with existing common law mechanisms requiring a showing of fault by the employer prior to the imposition of punitive damages.

1/ MR. FURNITURE's implicit suggestion that its alleged due process claim was unavailable until *Haslip* lacks merit. "The constitutional status of punitive damages ... is not an issue that is new to this Court." *Haslip*, 111 S. Ct. at 1040. In view of the legacy of constitutional challenges in the punitive damages context, *id.* at 1038-1040, MR. FURNITURE certainly could have raised its constitutional challenge earlier in this proceeding.

Attempting to use *Haslip* as a sword, MR. FURNITURE suggests, without elaboration, that Florida's employment of the fault criterion is somehow a violation of due process. In support, MR. FURNITURE asserts only that Florida's interest in preventing torts would be served by adoption of the Alabama rule and that the decision of the Florida Supreme Court in *Mercury Motors* is in reality a violation, rather than the expression, of Florida's interest in this regard. Petition for Writ of Certiorari at 10.

This contention is fundamentally flawed. Whatever the merits of the fault requirement as a mater of policy, MR. FURNITURE has no due process right to a federally imposed change of Florida policy. It is not fundamentally unfair to MR. FURNITURE to be required to prove "some fault" on BARCLAYS' part in order to recover punitive damages from BARCLAYS. MR. FURNITURE's Petition is nothing more than an open, unsupported invitation to this Court to impose, on policy rather than constitutional grounds, an expansion of punitive damage availability which the Florida legislature and courts have refused to adopt. This invitation contravenes the most recent Court pronouncement in the punitive damage context:

> In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are *questions of state law*...
>
> ....
>
> Although petitioners... would like us to craft some common-law standard of excessiveness... these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners

> suggest would require us to ignore the distinction between the state law and federal law issues. For obvious reasons we decline that invitation.

Browning-Ferris, 109 S. Ct. at 2922 (emphasis added).

The Court's pronouncement in the excessiveness context in *Browning-Ferris* applies with equal force here. The fact that one state's mechanism for assessing punitive damages passes constitutional muster does not mean that all states must employ that mechanism. Neither the Florida legislature nor the Florida courts have found it advisable to abandon the "some fault" requirement for imposition of punitive damages in vicarious liability situations. MR. FURNITURE's attempt to enlist this Court to establish a common law rule expanding the availability of punitive damages in Florida makes MR. FURNITURE's petition an improper candidate for certiorari, and it should be denied.

CONCLUSION

MR. FURNITURE's Petition for Writ of Certiorari improperly raises an alleged constitutional claim never raised in the District Court or Court of Appeals and, on the basis of MR. FURNITURE's dissatisfaction with the policy underlying a rule enunciated by the Florida Supreme Court, invites the Court to invade the state's prerogative and expand the availability of punitive damages contrary to the determinations of the Florida courts. The Eleventh Circuit properly interpreted Florida law in this case and that interpretation easily passes constitutional muster.

BARCLAYS respectfully requests that the Court deny MR. FURNITURE's Petition in this cause.

Respectfully submitted,

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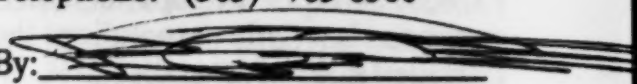
By: 
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